Supreme Court, U. S.
FILED
DEC 18 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-760

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, et al,
Petitioners,

vs.

PACIFIC FRUIT EXPRESS COMPANY, INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Respondent Pacific Fruit Express Company In Opposition

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Respondent Pacific Fruit Express Company In Opposition

Respondent PACIFIC FRUIT EXPRESS COMPANY (hereinafter referred to as "PFE") respectfully submits the following brief in Opposition to the Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

STATUTES INVOLVED

1. United States Code, Title 49, Section 16(12) (Interstate Commerce Act, Section 16(12)).
2. United States Code, Title 49, Section 1(14)(b) (Interstate Commerce Act, Section 1(14)(b)).
3. United States Code, Title 28, Sections 1336(b) and 1336(c).
4. United States Code, Title 28, Section 2325.

(The text of the listed statutes is set forth in the Appendix hereto.)

QUESTIONS PRESENTED

1. In an action before a single judge to enforce an order of the Interstate Commerce Commission under 49 U.S.C. Sec. 16(12), may petitioners (for the first time in this action) challenge the power of the Commission under 49 U.S.C. Sec. 1(14)(b) to make its order, thereby circumventing review by a three judge court in the District of Columbia, which currently has before it the identical question?

2. Assuming petitioners may now question the power of the Commission, could the Commission, under Sec. 1(14)(b), which makes unapproved protective service arrangements between railroads and carlines unlawful without Commission approval, require that an arrangement to which all petitioners were parties be superseded by new arrangements meeting prescribed standards of reasonableness?

STATEMENT OF THE CASE

This is an action to enforce an order of the Interstate Commerce Commission issued in 1962 in an investigation of mechanical protective service contracts entitled Ex

Parte No. 137, *Contracts for Protective Services*, 318 I.C.C. 111 (1962). (Petitioners' App. H) The District Court issued an injunction under Sec. 16(12) commanding obedience to the 1962 Order and granted judgment in favor of PFE on the issue of petitioners' liability for damages, pursuant to Secs. 8 and 9 of the Interstate Commerce Act (49 U.S.C. Secs. 8 and 9), and on quantum meruit. (Petitioners' App. F) The injunction aspect of the District Court's judgment was unanimously affirmed by the Court of Appeals for the Ninth Circuit on August 28, 1975. (Petitioners' App. B)

Some eleven years after the original order was issued, a number of the petitioning railroads commenced an action in 1973 before a three judge court in the District of Columbia to set aside the Commission's 1962 Order (*Southern Railway Company, et al. v. United States*, Civil No. 1776-73) which has been argued and submitted (the "review action"). PFE is an intervening defendant in that action. Significantly, petitioners have failed to inform this Court that the very issue they now seek to raise is one of the issues before the three judge court in the District of Columbia review action.

PFE's action results from petitioners' pervasive use of PFE's mechanical refrigerator cars and mechanical refrigeration units in those cars for hundreds of thousands of days and millions of miles on the lines of railroad of all the defendants below. Petitioners use PFE's mechanical refrigeration units to supply mechanical protective service to perishables moving on their railroads pursuant to their legal duty as common carriers and their public holding out to do so published in their joint tariffs. PFE's mechanical refrigeration units are serviced and maintained by PFE, and are designed to furnish complete continuous protection to perishables on all railroads over which the refrigerator car moves.

The contractual arrangement by which petitioners pay PFE for mechanical protective service, which was before the Commission in the proceedings leading to its 1962 Order, is known as "Division Sheet 7". Under the provisions of this contract, the railroads agreed among themselves to pay PFE 80% of the revenues derived from shippers for mechanical protective service. This amount was found by the Commission to be inadequate and the railroads were ordered to supersede that arrangement with new contracts meeting various criteria described in that Order.

Petitioners requested the District Court to refer the enforcement action to the Commission, as being within its primary jurisdiction. The District Court thereupon referred a number of questions to the Commission concerning its 1962 Order. In an order arising out of such referral, the Commission responded to the Court's interrogatories in *Contracts-Pacific Fruit Exp. Co. & Akron, C&Y Co.*, 340 I.C.C. 754 (1972). (Petitioners' App. E) Insofar as pertinent to the present petition, the Commission found:

1. That PFE furnished protective service within Sec. 1(14)(b) to all railroads participating in movements of perishables, irrespective of their status as originating, intermediate or terminating railroads.

2. That Sec. 1(14)(b), and the 1962 Order, requires the furnishing of mechanical protective service by PFE to the railroads to be covered by contracts which must be submitted to the Commission for approval.

3. That the arrangement then in effect between the railroads and PFE (i.e., Division Sheet 7) must be superseded by new contracts which conform with the criteria set forth in the 1962 Order.

4. That any railroad, whether originating, intermediate or terminating, that fails to enter into and file its arrangements for receiving mechanical protective service was and is in violation of Sec. 1(14)(b) and the Commission's 1962 Order.

Petitioners did not seek review of the 1972 Order in the District Court and, indeed, actually embraced it. The Court of Appeals rejected petitioners' later attempt to challenge the 1972 Order, as it was not made in the District Court within 90 days from the date that the ICC order became final, as required by 28 U.S.C. Secs. 1336(b) and (c).

Petitioners have adamantly refused to comply with the Commission's 1962 Order since its inception. They did not raise the question they now seek to present, i.e., the *power* of the Commission under Sec. 1(14)(b) to issue its order, before the Commission, or the courts below.

REASONS FOR DENYING CERTIORARI

I. Petitioners Did Not Raise the Question They Now Claim Is Presented, i.e., Whether Sec. 1(14)(b) "Empowers" the Commission or the Courts to Require Them to Enter Into Mechanical Protective Service Contracts, Either Before the Commission or the Lower Courts.

In the proceedings below, in connection with their argument that PFE did not have a right to have the 1962 Order enforced, petitioners argued that PFE had no relationship with them. Now, faced with findings by the Commission and the courts that such relationship exists and that PFE is an injured party which has the legal right to enforce the 1962 Order, they seek to challenge the Commission's right to exercise its authority under Sec. 1(14)(b). In fact, petitioners expressly disclaimed to the Court of Appeals any intention to attack the authority of the Commission to make the 1962 Order. (Appellant's Reply Brief in the Court of Appeals, page 13.[1]) It is fundamental that petitioners cannot

1. Petitioners made this representation to the Court of Appeals after having mentioned, in passing, the question of the Commission's authority under Sec. 1(14)(b) in their opening brief, and being met with PFE's contention that this and other assertions were improper collateral attacks.

argue on certiorari an issue that was not raised below. See *Neely v. Eby Construction Co.*, 386 U.S. 317, 330 (1966).

II. The Question Presented by Petitioners Is an Impermissible Collateral Attack on the Commission's Orders.

A party may not attack the validity of a Commission order except before a three-judge court, as prescribed by 28 U.S.C. Secs. 2321-25. This is the exclusive method of reviewing Commission orders, and collateral attack in another proceeding is improper.[2]

In an enforcement action, a Commission order is presumed to be valid, and even an indirect or unexpressed argument that a Commission order is wrong or is invalid is deemed a collateral attack which is precluded by 28 U.S.C. Secs. 2321-25. *B. F. Goodrich Company v. Northwest Industries, Inc.*, 424 F.2d 1349 (3rd Cir. 1970), *cert. den.*, 400 U.S. 822 (1970); *Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co.*, 418 F.2d 387, 398 (5th Cir. 1969), *cert. den.*, 397 U.S. 910 (1970), *reh. den.*, 397 U.S. 1030 (1970); *United States v. Southern Railway Company*, 364 F.2d 86 (5th Cir. 1966), *cert. den.*, 386 U.S. 1031 (1967); *Baltimore & O. R.R. v. United States*, 304 U.S. 58 (1938); *Venner v. Michigan C. R.R.*, 271 U.S. 127 (1926). Moreover, petitioners cannot indirectly attack the Commission's 1972 Order answering the District Court's questions, as they did not comply with 28 U.S.C. Secs. 1336(b) and (c).

III. Petitioners Have Raised the Identical Issue in Their District of Columbia Action to Review the 1962 Order.

The power of the Commission to require petitioners to contract with PFE in accordance with the Commission's

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2. The procedure was changed by Public Law 93-584, 88 Stat. 1918, effective January 2, 1975. Review actions are now heard by the Courts of Appeals.

1962 Order has been raised, thoroughly briefed and argued in the District of Columbia review action. Thus, a denial of this petition will not preclude a resolution of the very issue petitioners improperly attempt to present herein.

IV. The Writ Is Not Needed to Establish Uniformity of Decision.

Petitioners' claim that this Court should assume jurisdiction to establish uniformity of decision is not well founded. The merits of the Commission's actions in 1962 which petitioners are attempting to present in this enforcement action are at issue in the District of Columbia review action, and that is the proper court to make the determination, in the first instance. Petitioners state that a number of other carlines furnishing mechanical protective service to railroads have commenced similar actions. These actions, which also seek recovery on the basis of the 1962 Order, were filed after the District Court's judgment in PFE's favor. All of them have been stayed pending resolution of the review action.

V. The Commission, Under Sec. 1(14)(b), Was Clearly Authorized to Consider the Reasonableness of Petitioners' Arrangement to Compensate PFE for MPS, and to Order That It Be Superseded.

Although the petition should be denied for the reasons previously stated, we will also state briefly our position regarding the powers of the Commission under Sec. 1(14)(b).

Petitioners claim that Sec. 1(14)(b) gives the Commission only the power to approve what is submitted to it, without more (Petition, page 15). By their own admission (Petition, page 10) Division Sheet 7, to which the petitioners were parties, was before the Commission, and the Commission found that it was an arrangement for provid-

ing MPS, yet the petitioners assert that the Commission created, and the lower courts have enforced, contractual obligations between petitioners and PFE which did not previously exist. This is not correct. Petitioners were ordered by the Commisison and the courts to supersede their contract, Division Sheet 7, and enter into new contracts complying with the 1962 Order. The Commission's power flowed directly from Sec. 1(14)(b), which states that it is "unlawful" for a railroad to have a protective service arrangement "unless and until" it is submitted to and approved by the Commission. Under the statute, as well as the 1962 Order, petitioners were compelled to submit their contracts to the Commission. There is no significant issue of federal law to be resolved by this Court because the action of the Commission in requiring that an existing and inadequate protective service arrangement be superseded and the decisions of the lower courts requiring obedience to the Commission order were clearly authorized. The Commission did not create obligations which did not exist; it merely ordered that existing arrangements be placed on a proper basis.

Contrary to petitioners' claim that Sec. 1(14)(b) is "limited" and "narrow" (Petition, pages 13-14), its legislative history supports the broad scope of the Commission's power. In its 45th Annual Report to the Congress (1931), the Commission recommended that it be given "adequate supervision and control over the arrangements for service and compensation" between railroads and carline companies. The Commission continued to urge Congress to give it supervision and control over protective service and compensation, and in 1940 it submitted statutory language which was adopted by Congress in enacting Sec. 1(14)(b). Immediately thereafter, the Commission entered an order

construing broadly its grant of power under Sec. 1(14)(b) by requiring all railroads to file copies and obtain approval of all their protective service contracts or arrangements, written or unwritten. (See Ex Parte No. 137, *Contracts for Protective Services*, 246 I.C.C. 145, 146 (1941)). This early construction of Sec. 1(14)(b), which has been followed consistently by the Commission through the years, is entitled to great weight. *U.S. v. Amer. Trucking Ass'ns.*, 310 U.S. 534, 549 (1940). Therefore, the Commission not only had the power in 1962 to consider the contracts submitted, but also had the power to remedy violations of Sec. 1(14)(b). *United States v. B. & O. R. Co.*, 333 U.S. 169 (1948); *Baltimore & O. R. Co. v. United States*, 20 F.Supp. 273 (S.D.N.Y. 1937), *aff'd*, 305 U.S. 507 (1939).

The cases cited by petitioners (*I.C.C. v. Oregon-Washington R. Co.; St. Joe Paper Co. v. Atlantic Coastline R. Co.;* and *Neisloss v. Bush*) (Petition, page 15) are not in point. They involved the Commission's totally different authority under Sec. 1(18) of the Interstate Commerce Act to approve a voluntary application to construct a railroad, and under Sec. 5 to approve various types of control by one carrier of another, pursuant to their voluntary agreement. The crucial distinction is that under both Secs. 1 and 5, carriers are not required to undertake line extensions or to enter into control agreements, whereas they are required to submit their protective service arrangements to the Commission under Sec. 1(14)(b).

Sec. 1(14)(a) is also mistakenly relied on by the petitioners. That section confers upon the Commission certain authority over car service, not protective service. This Court has refused to limit the Commission's power under a particular section because other sections of the Act specify its authority in more detail in other situations.

American Trucking v. A., T. & S.F. R. Co., 387 U.S. 397 (1967); *United States v. Pennsylvania R. Co.*, 323 U.S. 612 (1945).

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Dated: December 17, 1975.

Respectfully submitted,

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(Appendix Follows)

Appendix

Statutes Involved

1. United States Code, Title 49, Section 16(12) (Interstate Commerce Act, Section 16(12)).

> "If any carrier fails or neglects to obey any order of the commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

2. United States Code, Title 49, Section 1(14)(b) (Interstate Commerce Act, Section 1(14)(b)).

> "It shall be unlawful for any common carrier by railroad or express company, subject to this chapter, to make or enter into any contract, agreement, or arrangement with any person for the furnishing to or on behalf of such carrier or express company of protective service against heat or cold to property transported or to be transported in interstate or foreign commerce, or for any such carrier or express company to continue after April 1, 1941, as a party to any such contract, agreement, or arrangement unless and until such contract, agreement, or arangement has been submitted to and approved by the Commission as just, reasonable, and consistent with the public interest: *Provided*, That if the Commission is unable to make its determination

with respect to any such contract, agreement, or arrangement prior to said date, it may extend it to not later than October 1, 1941."

3. United States Code, Title 28, Sections 1336(b) and 1336(c).

"(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final."

4. United States Code, Title 28, Section 2325. (Repealed effective January 2, 1975.)

"An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."